HONGKONG & SHANGHAI BANKING CORP.

v.

LEONG HON KIM ENTERPRISES SDN. BHD. & ORS.

HIGH COURT BORNEO
SYED AHMAD IDID JC
[CIVIL SUIT NO. T. 278 OF 1987]
15 OCTOBER 1991

CIVIL PROCEDURE: *Application for summary judgment - Defences - Whether forbearance applies - Whether 2nd defendant should have been joined by a co-surety - Whether material to guarantee document - Section 97 of the Contracts Act 1950. Doctrine of undue influence - Whether applies - Issue of fiduciary relationship - Whether inequality of bargaining power - No triable issues.*

The plaintiffs applied for summary judgment under O. 14 against the two defendants. There was a similar action *vide* T. 275 of 1987 involving the same plaintiffs and second defendant. Only the first defendant was different.

The SAR informed the Court that the parties had earlier agreed to have T. 275 of 1987 heard and then its decision would bind this present action of T. 278 of 1987. But for some excuse or reason not made known to this Court, the parties proceeded with this action.

Inter alia, issues raised centred on the defences raised by the parties in the case.

Held:

[1] There are no triable issues raised in the 1st defendant's defence. First defendant's counterclaim together with its defence are dismissed with costs.

[2] As for the 2nd defendant, the question of forbearance and the validity of the guarantee were other defences raised. On the evidence there was sufficient ground for the 2nd defendant to have his guarantee signed and his defence that there was no consideration is not acceptable.

[3] The second defendant should have stated clearly that he was to be joined by a co-surety. There should have been, but there was none, evidence that the guarantee document was to have been signed by two or more and yet only one signed. The Court cannot find that his signing the guarantee alone has violated s. 97 of the Contracts Act 1950.

[4] The equitable doctrine of undue influence covers a wide area. The Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its existence. The cases I have referred to show that, influence is acquired and abused where confidence is reposed and betrayed.

[5] The facts and the law are clear in these cases: they support the plaintiffs and they cannot assist the first and second defendants.

[Order in terms of plaintiffs' application granted with costs.]

Cases referred to:

Percetakan Solai Sdn. Bhd. & Anor. [1985] CLJ (Rep) 632 ***(cit)***
Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim [1985] 2 MLJ 225 ***(cit)***
Jaya Kumar v. Subramaniam Mohana Krishnan & Anor. [1987] 2 MLJ 432 ***(cit)***
Citibank N.A. v. Ooi Boon Leong & Ors. [1981] 1 MLJ 283 ***(cit)***

Southern Bank Bhd. v. Toh Choe Beng & 6 Ors. [1986] CLJ (Rep) 682 ***(cit)***
Ngai Heng Book Binder Pte. Ltd. v. Syntax Computer Private Ltd. [1988] 2 MLJ 205 ***(cons)***
Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] CLJ (Rep) 182 ***(cons)***
Hu Sepang v. Keong On Eng & Ors. [1991] 1 MLJ 440 ***(cons)***
Osman bin Abdul Ghani & Anor. v. United Asian Bank Bhd. [1987] CLJ (Rep) 261 ***(foll)***
Fullerton & Anor. v. Provincial Bank of Ireland [19003] AC 309 ***(foll)***
The Chartered Bank v. Cheviot Industries (M) Sdn. Bhd. & Anor. [1988] 1 CLJ (Rep) 432 ***(foll)***
Perwira Habib Bank Bhd. v. Fast Travel L (M) Sdn. Bhd. & Ors. [1988] 3 MLJ 210 ***(foll)***
National Provincial Bank of England v. Brackenbury [1906] 22 TLR 797 ***(cit)***
Lin Securities (Pte) v. Noone & Co. Sdn. Bhd. & Klang Jaya Bharu Dvpt Bhd. [1989] 2 CLJ (Rep) 76 ***(cit)***
Tate v. Williamson [1866] lr 2 Ch App 55 ***(foll)***
Smith v. Kay [1859] 7 HLC 750 ***(foll)***
Powell v. Powell [1900] 1 Ch 243 ***(cons)***
Lloyds Banks Ltd. v. Bundy [1975] QB 326 ***(cons)***
Wallingford v. Mutual Society [1880] 5 AC 685

Other source referred to:
Encyclopedia of Banking by Cresswell

Legislation referred to:
Contracts Act 1950 s. 97

JUDGMENT

Syed Ahmad Idid JC:

The plaintiffs applied for summary judgment under O. 14 of the Rules of the High Court 1980 against (a) 1st defendants for RM291,839.86 being overdraft facilities granted including accrued interest; and (b) 2nd defendant for RM285,817.59 plus interest thereon at 9.75% per annum from 14 July 1987 until date of payment and costs.

There was a similar action vide T. 275 of 1987 involving the same plaintiffs and 2nd defendant. Only the 1st defendants was different. In that case the 1st defendant was United Leong Enterprises Sdn. Bhd.

The Assistant Registrar informed me that the parties had earlier agreed to have T. 275 of 1987 heard and then its decision would bind this present action of T. 278 of 1987. But for some excuse or reason not made known to this Court, the parties proceeded with this action.

The action against both the 1st and 2nd defendants was heard on 15 October 1991 in Tawau. I shall first deal with the 1st defendants. In summary, 1st defendants' defences and counterclaim were:

(a) a general denial that they were indebted to the plaintiffs as claimed; (see para. 2 of the statement of defence and counterclaim); and that it was therefore incumbent on the plaintiffs to strictly prove their claims to the hilt and/ or entitlement against the 1st defendants;

(b) that the plaintiffs were negligent in allowing them to draw cheques in excess of the approved limit of its banking facilities; and

(c) that the plaintiffs' loss were self-imposed when they prevented the 1st defendants from selling their two (2) pieces of land held under CL No. 10533891 and CL No. 015385645 and utilising the proceeds of sale to pay the banking facilities. It was further claimed that plaintiffs' wrongful detention and refusal to return to them the title deeds (see para. 3 and 4 of the statement of defence and counterclaim) caused such loss.

In addition, the 1st defendants also said that the excess amount claimed by the plaintiffs came about by the plaintiffs' own negligence by:

(a) wrongfully debiting the 1st defendants' account No. 396-011678-001 and using the debited amount to pay of Syarikat United Leong Enterprise Sdn. Bhd.'s account No. 396-017055-034. The total debts including interest amounted to RM25,758.40; and

(b) wrongfully debiting the 1st defendants' accounts to pay other creditors against the terms of a standing instruction which provided that the debit under the standing instruction should only be made if sufficient funds were available in the 1st defendants' accounts. Such debits being payment of AIA Life Premiums and to STP Distributors on behalf of the 1st defendants amounted to RM9,382.21 only.

On the laws cited in:

(a) *Percetakan Solai Sdn. Bhd. & Anor.* [1985] CLJ (Rep) 632;

(b) *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali Bin Ibrahim* [1985] 2 MLJ 225;

(c) *Jaya Kumar v. Subaramanian Mohana Krishnan & Anor.* [1987] 2 MLJ 432;

(d) *Citibank N. A. v. Ooi Boon Leang & Ors*. [1981] 1 MLJ 283;

(e) *Southern Bank Berhad v. Toh Choe Beng & 6 Ors.* [1986] CLJ (Rep) 682;

and the explanation as to honouring cheques exceeding approved limit dealt in *Encyclopaedia of Banking* by Cresswell as well as the case of *Wallingford v. Mutual Society* [1880] 5 App. cases 685, taken and compared to the evidence adduced, I come to the conclusion that the 1st defendants' counterclaims cannot be allowed to stand. I have also considered the cases of *Ngai Heng Book Binder Pte. Ltd. v. Syntax Computer Private Ltd*. [1988] 2 MLJ 205; *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] CLJ (Rep) 182; *Hu Sepang v. Keong On Eng & Ors.* [1991] 1 MLJ 440 and I find that there are no triable issue raised in 1st defendants' defence. 1st defendants' counterclaim, together with its defence, are accordingly dismissed with costs. So I grant an order-in-terms of plaintiffs' application.

As for the 2nd defendant, who is a director of the 1st defendants, similar claims had been made and accordingly on those my findings are the same as for the 1st defendants. But additionally the 2nd defendant raised other defences such that :

(a) the guarantee was given a past consideration or alternatively, there was no consideration to support the guarantee and consequently the guarantee was not binding on the 2nd defendant; (as in para. 5, 6 and 7 of the statement of defence); and

(b) the said guarantee was procured by undue influence on the part of the plaintiffs (as in para. 8 of the statement of defence).

The question of forebearance (as consideration for a guarantee) has been dealt in:

(i) *Osman Bin Abdul Ghani & Anor. v. United Asian Bank Bhd.* [1987] CLJ (Rep) 261;

(ii) *Fullerton & Anor. v. Provincial Bank Of Ireland* [1903] AC 309;

and that on the validity of guarantee were adequately dealt by:

(i) *The Chartered Bank v. Cheviot Industries (M) Sdn. Bhd. & Anor.* [1988] 1 CLJ (Rep) 432;

(ii) *Perwira Habib Bank Bhd. v. Fast Travel L (M) Sdn. Bhd. & Ors*. [1988] 3 MLJ 210.

I find on the evidence that there was sufficient ground for the 2nd defendant to have given his guarantee which he signed and his defence that there was no consideration is not acceptable.

Coming to the last issue - whether 2nd defendant had signed the guarantee under undue influence? The Judge in the Civil Suit No. T. 275 of 1987 (unreported) had this to say of 2nd defendant (who is also the 2nd defendant in this action):

> Firstly, the (2nd defendant) is a Ph. D. holder, as such, an educated man. He was involved in business and not a stranger in the business world. As such he is not an 'ordinary man on the omnibus'

The 2nd defendant was in Court. I had the opportunity to observe him. There was no evidence as to the institution from which he obtained the doctorate so I cannot credit him with the high praises that was bestowed upon him in T. 275 of 1987. All I can say is that the 2nd defendant is merely an ordinary litigant who, if he can gain time or indulgence from plaintiffs or the Courts, would seek such concessions. I shall give him the benefit of the doubt.

The 2nd defendant in para. 9 of his affidavit - in-opposition under the heading "particulars of undue influence" deposed, *inter alia*, as follows:

> The manager insisted that the directors of the 1st defendants, including me should guarantee the repayment of the loan failing which they would foreclose the security.
>
> Then sometime in October 1986, or/and many occasions, the plaintiffs' solicitors, one Frederick Lo, kept telephoning and asking me and my wife the other director of the 1st defendants, to sign a Letter of Guarantee.
>
> At the Coffee House, Mr. Lo told me that I must sign the Guarantee and if I agreed he would not ask my wife to sign it.

Frederick Lo Ming Yong in his affidavit-in-reply sworn on 20 January 1990 filed on behalf of the plaintiffs at para. 4 deposed, *inter alia*, as follows:

> I never telephoned the 2nd defendant personally and asked him to come to my office as alleged. It was the 2nd defendant who invited me to meet him at the Coffee House at Royal Hotel. At the meeting he (again) asked my assistance to persuade the bank to waive the guarantee and to which request I could not accede. He had made such request before. **I never said that he must sign the guarantee neither did I have the authority or instruction from the plaintiffs to waive the requirement of guarantee by his wife (who was a director of the 1st defendants).**

Here I had a divergent claim - if indeed there was no waiver, the guarantee document should have been signed by 2nd defendant and his wife. But in the end it was signed by 2nd defendant alone. Going on the law, this could absolve the guarantor who signed without his co-guarantor. (See *National Provincial Bank of England v. Brackenbury* [1906] 22 TLR 797; *Lin Securities (Pte.) v. Noone & Co. Sdn. Bhd. And Klang Jaya Bharu Development Bhd*. [1989] 2 CLJ (Rep) 76. The 2nd defendant should have stated clearly that he was to be joined by a co-surety. There should have been, but there was none, evidence that the guarantee document was to have been signed by two or more and yet only one signed. I cannot, therefore, find that his signing the guarantee alone has violated s. 97 of the Contracts Act 1950. Can I, however, reluctantly find if 2nd defendant was frightened by the bank or that he was distressed when he signed the guarantee? While I find that the meeting in the Coffee house to discuss serious issues of banker *vis-a-vis* customer in trouble was not a suitable step in solving this problem, that alone cannot be a source of distress or of undue influence.

> The equitable doctrine of undue influence covers a wide area. Lord Chelmsford L.C. said: The Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise.

Tate v. Williamson [1866] 1. r. 2 Ch. App. 55. The cases I have referred to show that "... influence is acquired and abused, where confidence is reposed and betrayed." *Smith v. Kay* [1959] 7 HLC 750. I asked myself: "Is the relationship between the plaintiffs (or their officers and agents) and the 2nd defendant fiduciary?" See *Powell v. Powell* [1990] 1 Ch. 243. The answer is "No". So I went on to discover if there had been inequality of bargaining power? See *Lloyds Bank Ltd. v. Bundy* [1975] QB 326 where at page 339, Lord Denning MR said:

> By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.

At this day and age, contracts are entered into under overwhelming commercial pressures but this in itself cannot be a ground to impeach a transaction. If I allow this, then no contracts will ever be sacrosanct and people with crooked intentions will be protected. I do not consider 2nd defendant was so naive or so meek as to be unduly influenced. He appears to be of strong character and such defence will only harm his reputation. The society he operates in may laugh him out of the system. This will hurt his future.

A long period of time has gone by between the filing of the claim. Plaintiffs application and the delivery of this judgment. It is not healthy for businessmen to wait too long for a decision. It is not equitable to permit trivial issues to become triable issues and then delay further the determination of the action. The facts and the law are clear in this case: they support the plaintiffs and they cannot assist the 2nd (and the 1st) defendants. Accordingly I also grant an order-in-terms of plaintiffs' application with costs.

Also found at [1992] 2 CLJ 814